IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE ROWELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPREME COURT
NO: 75-1091
COURT OF APPEALS
NO: 75-1437

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, by his attorneys, NORMAN ZEMKE and LUSTIG, AND FRIEDMAN, P.C., prays that a Writ of Certiorari issue to review the Judgment heretofore entered against him by the United States Court of Appeals for the Fifth Circuit, and in support thereof states as follows:

I. OPINIONS BELOW

The Petitioner was convicted following a jury trial in the United States District Court for the Middle District of Florida of Conspiracy to Distribute 81.6 grams of Phencyclidine (hereinafter referred to as PCP) in violation of 21 USC 841(a)(1) and 21 USC 846. Following the Petitioner's conviction and sentencing an Appeal was taken to the Fifth Circuit Court of Appeals. By Judgment and Opinion dated December 29, 1975, the Court of Appeals affirmed the conviction of the Petitioner (Appendix A). Petitioner was re-

represented at the trial and on Appeal by counsel in Jacksonville, Florida. The Petitioner is a resident of the State of Michigan and did not contact the undersigned counsel until January 15, 1976 for purposes of representing Petitioner with respect to the filing of the instant Petition. A request for a Stay of the Mandate of the Fifth Circuit Court of Appeals was filed and granted to and including January 29, 1976 (Appendix B). However, the undersigned counsel did not receive the Order Staying the Mandate until January 24, 1976, and the Petitioner's file has still not been received from previous consel. Although the within Petition is not being filed timely in accordance with this Court's Rules, late filing is due solely to the fact that the undersigned counsel was not retained until January 15, 1976, and the only information provided to counsel concerning the merits of this cause consists of the Opinion of the Court of Appeals.

II. JURISDICTION

The Opinion of the Fifth Circuit Court of Appeals was entered on December 29, 1975. The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

III. QUESTIONS PRESENTED

The Petitioner claims that his conviction amounted to a denial of due process of law because the record is devoid of any competent evidence tending to establish his guilt. In addition, Petitioner contends that the Court of Appeals' reliance upon an uncorroborated admission of the Petitioner will not suffice to establish a connection between him and the alleged co-conspirators.

IV. STATUTES AND CONSTITUTIONAL PROVISIONS

The constitutional provision involved herein is the Due Process clause of the Fifth Amendment to the United States Constitution which provides:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law;"

21 USC 841(a)(1) provides as follows:

> "(a) except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;"

21 USC 846 reads as follows:

> "any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or

fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

V. STATEMENT OF THE CASE

The Petitioner along with two others, Killian and Mathewson, were convicted of conspiracy to distribute PCP, the Petitioner having been indicted only on one count of conspiracy. Testimony was received showing that a Federal agent met with Mathewson and two others to arrange a purchase of PCP on July 6, 1974. After one sale was made, discussions were had concerning a second purchase with one Turner, who advised the agent that the PCP came from an individual in the Detroit area.

The Federal agent went to the home of this individual to purchase two (2) ounces of PCP on July 22, 1974, when the agent arrived at this persons home the Petitioner's co-defendants, Killian and Mathewson, were present. Killian had a discussion with the agent about purchasing eight (8) more ounces and stated that these additional drugs were in Detroit. It was after this conversation that Killian, Mathewson and the third man were arrested. After the arrest, a phone call came from an individual who identified himself as George, supposedly the Petitioner, who was attempting to locate a Charlie, supposedly the Defendant, Mathewson. Several more calls came from the individual identified as George and he stated that he would be arriving in Jacksonville on Delta Airlines flight 881 arriving at 1:36 a.m. The Petitioner was

met at the airport by several Federal agents acting in an undercover capacity (Appendix A p.2).

The Petitioner had some conversation with the agents during which time he indicated that he had left Detroit with "fifty (50) hits of PCP", but that he had given them to a girl whom he met on the airplane (App A p3). This was the only testimony received during the course of the trial concerning Petitioner, save a statement by another witness that the Petitioner had indicated on the telephone that he was coming from Detroit, Michigan (App A p.4).

The Court of Appeals decision recognized that there was substantial evidence linking the co-defendants, Killian and Mathewson, with a conspiracy (App p. 3). The only testimony concerning Petitioner were his admissions made at a point in time after the conspiracy had ceased because of the arrest of Killian and Mathewson.

The Opinion of the Court of Appeals made reference to the fact that there were other statements attributed to the Petitioner by one of the agents, but they were not introduced because the trial court ruled that they would have been prejudicial to the other defendants under the rule of Bruton v United States, 391 US 123 (1967) (App p.5).

The Court of Appeals concluded that there was testimony linking the Petitioner with the conspiracy based on testimony that the PCP source was in Detroit, that Petitioner was arranging a meeting with the individuals just arrested in Jacksonville and because Petitioner had started South with a quantity of PCP (App p.5).

The Court of Appeals recognized that the statement of Petitioner would

not be admissable as against the co-defendants, but held that it alone was sufficient to tie him into the conspiracy (App Ap5). In addition, the Court recognized that it was improper for the government attorney in his opening statement to refer to the fact that Petitioner stated he was the source for the PCP that Mathewson was selling in Florida because of the fact that this statement was ruled inadmissable by the trial court. (App p6). The Court held that this was not reversible error because no motion for a mistrial or to strike was made at the time of the improper statement, defense counsel waited until the conclusion of the trial to make a motion for mistrial (App Ap6).

VI. ARGUMENT

The Petitioner urges that the Court of Appeals erred by concluding that there was evidence linking him with a conspiracy. The only way that this could be done would be by taking into consideration the excluded statements of Petitioner, which were improperly alluded to in the opening statement of the government attorney. The only other basis for the Court's conclusion would be an improper inference that fifty (50) "hits" of PCP gratuitously given away by Petitioner, which statement was uncorroborated, somehow can be equated with a co-defendant's efforts to obtain a vastly larger quantity, eight (8) ounces, of PCP.

The decision of the Court of Appeals is clearly at odds with previous Opinions of this Court. For example, in Thompson v Louisville, 362 US 199 (1960) this Court held that it is a due process violation for a conviction to be based on no evidence. The same conclusion

was reached in two other decisions of this Court, Vachon v New Hampshire, 414 US 478, rehearing denied, 415 US 952 (1974); Gregory v City of Chicago, 394 US 111 (1969).

The decision of the Fifth Circuit Court of Appeals in the instant case is also at odds with decisions of other Circuits. For example in United States v Wright, 450 F2d 993, 994 (10th Cir 1971) the Court held;

> "Proof of mere association and presence at the scene of a crime, and raising a mere suspicion of guilt of the offense charged, is not sufficient".

In Wright, the Court held that the evidence is to be viewed in the light most favorable to the government in determining if there is sufficient substantial proof together with reasonable inferences from which a jury could find the defendant guilty beyond a reasonable doubt. However, as the above quotation demonstrates a mere suspicion is not sufficient.

In United States v Delay, 440 F2d 566 (7th Cir 1971) the Court held that substantial evidence sufficient to support a conviction means relevant probative evidence which reasonable minds would accept as adequate to support a conclusion. In that case there was evidence that the defendant had been seen in the company of a co-defendant on one occasion and that he had falsely endorsed the name of another upon a check he used to pay for a stolen car. His conviction on a conspiracy charge was reversed on the basis that there was no substantial evidence to support same.

The error in the instant case is twofold. First, the Court of Appeals relied upon an uncorroborated admission in order to establish the offense charged.

It should be remembered that the Court found that the conspiracy had ended at the point in time that the admissions were elicited from the Petitioner. More than the Petitioner's mere identity was sought to be established by the use of his statements. The Court made reference to the fact that he identified himself on the phone as coming from Detroit, and he stated that he had a small quantity of PCP which he gave away on the plane en route to Jacksonville. This Court has held that an uncorroborated admission or confession cannot be used to establish the commission of a crime, even in a case where no tangible injury can be pointed to as a corpus delicti, Smith v United States, 348 US 147 (1954). Although Smith and other cases, e.g. Wong Sun v United States, 371 US 471 (1963), required that corroboration was necessary for all elements of the offense established by the admission alone, "extrinsic proof was sufficient which merely fortifies the truth of the confession without independently establishing the crime charged" 371 US at 489. This rule has been interpreted by some courts to require corroboration of essential acts or elements, United States v Davis, 459 F2d 167 (6th Cir 1972); others have held that some elements can be proven by an admission alone, United States v Abigando, 439 F2d 827 (5th Cir 1971); and others have held that only the trustworthiness of the statement need be corroborated without first establishing the corpus delicti, United States v Wilson, 436 F2d 122 (3rd Cir), cert. denied, 402 US 912 (1971). The Petitioner urges that in the instant case there is a complete lack of corroboration no matter which theory is followed. The crucial link in the minds of the Court of Appeals appears

to have been the statement attributed to the Petitioner that he had fifty (50) "hits" of PCP while on the airplane. There is nothing to corroborate this statement whether it is viewed as establishing the existence of the crime of conspiracy, the Petitioner's link with the conspiracy, or for any other purpose whatsoever. If the admission is viewed as consisting of a vital element in the government's case, then there must be corroboration. Smith v United States, supra at 155. Clearly, the Petitioner's conviction is invalid as being in conflict with applicable decisions of this Court and with decisions of other Courts of Appeals.

The second error committed by the Court of Appeals was it's reliance upon matters outside of the record in order to support the Petitioner's conviction. Even if it is assumed that there is corroboration of Petitioner's statements and admissions, which Petitioner urges is clearly not the case, there is no evidence whatsoever linking the Petitioner with the conspiracy charged. However, it is significant that the Court of Appeals felt constrained to make reference to the fact that Petitioner's statements were only a small part of what the government intended to introduce in the case. The Court was aware that there were allegedly other statements from Petitioner of a more incriminating nature which were referred to by the government attorney in his opening statement. (App Ap6). Because this evidence was not permitted to be introduced by the trial court, it is clear that the record lacked any relevant evidence as to a crucial element of the offense, and the Petitioner's conviction was, therefore, violative of due process of law. Vachon v New Hampshire, supra.

The record in the instant cause is totally devoid of any evidence establishing the Petitioner's involvement or connection with a conspiracy. The Court of Appeals decision is inconflict with prior rulings of this Court and with other Courts of Appeals in that the Fifth Circuit has sustained a conviction based upon a lack of evidence. For example, in United States v Spock, 416 F2d 165, 179 (1st Cir 1969) the Court held that there must be substantial evidence and not a mere scintilla to justify submitting a case to a jury. The Petitioner suggests that the Court of Appeals may have additionally been influenced by the uncorroborated statement of the Petitioner to the effect that he was in possession of a small quantity of PCP while on the airplane en route to Jacksonville. Even if it could be argued that there was independent proof of the Petitioner's involvement in the illegal possession of a controlled substance, this would not suffice in order to support a conviction in the instant case. In United States v Tavoularis, 515 F2d 1070 (2nd Cir 1975), the Court of Appeals recognized that a conviction cannot be sustained if it is not based upon evidence which establishes every element of the offense charged. In that case the defendants were charged with conspiracy to possess and possession of treasury bills knowing same to have been stolen from a bank. Although there was an abundance of testimony showing the defendant's possession of the stolen bills, the record was devoid of evidence showing any knowledge on the part of the defendant of the fact that same had been stolen from a bank. In the instant case it cannot be shown that there is any competent evidence showing the Petitioner's guilt of another

crime, while in Tavoularis there was substantial evidence showing the commission of another offense. However, the reasoning of the Court of Appeals is worthy of note as it reflects upon what may well have occurred in the instant cause. The Court stated;

> "Our system of administering justice requires that a defendant, no matter how guilty he may be of some crime, cannot be convicted unless there is proof beyond a reasonable doubt that he committed the particular crime with which he is charged. 515 F2d at 1077".

The Petitioner's conviction in the instant case is in violation of the due process clause of the Fifth Amendment. There was absolutely no evidence tending to establish the Petitioner's involvement in a criminal conspiracy, even including his improperly admitted uncorroborated admissions. Indeed, the most that can be said for the government's case is that the opening statement of the government attorney referred to an admission that was allegedly made by the Petitioner showing involvement in the conspiracy charged. However, no evidence was ever received during the course of the trial in support of this statement by the government attorney. Apart from any consideration of the prejudicial effect of this statement, the case went to the jury as to the Petitioner without any evidence whatsoever to support a conviction. This result is in direct conflict with prior decisions of this Court and with other Courts of Appeals which have repeatedly held that this result cannot be permitted under the provisions of the due process clause. This Court is asked to grant the within Petition in order to clarify the

question of the improper use of an uncorroborated admission, and to insure that the decision of the Fifth Circuit Court of Appeals will conform to prior rulings of this Court and other Courts of Appeals.

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

George KILLIAN, George Rowell and Charles Mathewson,
Defendants-Appellants.

No. 75-1437.

United States Court of Appeals,
Fifth Circuit.

Dec. 29, 1975.

Defendants were convicted in the United States District Court for the Middle District of Florida, at Jacksonville, Gerald B. Tjoflat, J., of violating the Federal Controlled Substances Act, and they appealed. The Court of Appeals, Tuttle, Circuit Judge, held that the evidence was sufficient to convict two defendants of conspiracy to distribute phencyclidine hydrochloride; that although statements made by the third defendant to agents after the arrest of the first two defendants were not admissible against the latter defendants, they could be considered as admissions against interest connecting the declarant as a member of the conspiracy; and that although certain representations made by the Government during its opening statement were improper, no prejudice to the defendants resulted.

Affirmed.

1. Conspiracy ⇐47(12)

Evidence in prosecution under Federal Controlled Substances Act was sufficient to support conviction of defendants of conspiring to distribute 81.6 grams of phencyclidine hydrochloride. 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

2. Criminal Law ⇐424(1)

Statements made by alleged coconspirator to federal agents after arrest of other coconspirators were not legally admissible in evidence against latter, since conspiracy had terminated with their arrest.

3. Criminal Law ⇐422(9)

Even though statements made by alleged coconspirator to government agents after arrest of other coconspirators were not admissible in evidence against other coconspirators, they were admissible in joint trial as against declarant as admissions against interest to be considered by jury as bearing upon declarant's membership in conspiracy.

4. Criminal Law ⇐673(4)

Even giving of limiting instruction may not be sufficient where codefendant's confession in joint trial so clearly implicates complaining defendant as to make it impossible for jury to consider it only against defendant who made it.

5. Criminal Law ⇐1169.7

Even though statements of coconspirator, made to federal agents after other coconspirators' arrest, were inadmissible as to other coconspirators in joint trial, other coconspirators were not prejudiced and admission of such statements was harmless beyond reasonable doubt where conspiracy had already been overwhelmingly proved against other coconspirators.

6. Criminal Law ⇐703, 1171.2

Prosecuting attorney acted improperly in referring during opening statement to confession by codefendant which he knew would be subject to attack on ground of its being hearsay as to remaining defendants and as having been made after termination of alleged con-

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spiracy; reversible error did not result, however, in view of facts that confession was not necessary to codefendants' convictions and that codefendants did not object to statements until prosecution rested its case, and did not make timely motion for mistrial.

7. Criminal Law ⇐703

It is improper conduct for prosecuting officer to state categorically to jury that one of defendants has confessed to crime for which he is on trial unless such confession has already met test of voluntariness and other questions of admissibility that may lurk in trial to come.

8. Witnesses ⇐35, 41

Trial court in drug prosecution did not abuse discretion in allowing witness to testify despite contentions that he was heavy user of drugs and suffered from time to time from hallucinations.

Appeals from the United States District Court for the Middle District of Florida.

Before TUTTLE, THORNBERRY and CLARK, Circuit Judges.

TUTTLE, Circuit Judge:

These three defendants appeal from convictions following jury verdicts for violating the Federal Controlled Substances Act. Killian and Mathewson were convicted of conspiracy to distribute 81.6 grams of Phencyclidine Hydrochloride (PCP) in violation of 18 U.S.C. § 2, 21 U.S.C. § 841(a)(1), 846. Defendant Rowell was indicted only on the conspiracy count and was convicted on that count.

On July 6, 1974, in Jacksonville Beach, Florida, Agent Driver of the Drug Enforcement Administration met Richard Turner, Fontain Fitch and appellant Charles Mathewson to set up a purchase of PCP; Driver purchased one ounce for $1,650. On July 15, Driver called Turner to attempt to purchase eight ounces; Turner was amenable to the sale but said that at that time he had only two ounces so he would have to purchase more; during the conversation, Turner disclosed that the drugs came from an individual in the Detroit area. On July 22, Driver called Turner again and arranged to buy two ounces that afternoon at Turner's home; when Driver arrived several other individuals were in Turner's apartment, including defendants Killian and Mathewson.

Turner and Driver agreed on $2,500 for the two ounces; before Driver left to get the money, Killian approached him and asked if he was still interested in purchasing eight more ounces and Driver said he did want more drugs. Killian then stated that the additional drugs were in Detroit but he would guarantee delivery the next morning. Immediately after this conversation, Turner, Mathewson and Killian were arrested. After this arrest, a phone call came to Turner's apartment from an individual who identified himself as George (allegedly Rowell) and who was trying to locate Charlie (allegedly Mathewson); the agents took the call and told George that Charlie was unavailable and volunteered to take a message. George said he needed to talk to Charlie before 9 p.m. to see if Charlie wanted him on the plane. George made three more calls that evening trying to locate Charlie; in the last he told Agent Starrart without, of course, knowing his identity, that he would be arriving in Jacksonville on Delta Flight 881 at 1:36 a.m. Several agents met Rowell, evidently recognizing him by his resemblance to the other arrestees, and engaged him in conversation without identifying themselves; Rowell

thought Charles had sent them. Rowell told the agents that he had left Detroit with 50 hits of PCP but that he had given it to a French girl whom he met on the plane.[1]

The first contention is made on behalf of all of the appellants. It is that the court erred in permitting testimony regarding the activities and the statements made by George Rowell after the arrest of the co-defendants, Killian and Mathewson, in evidence. Rowell raises the issue because he contends that without the admission of this testimony there is nothing to connect him with the conspiracy which terminated just before his telephone call which was intercepted by the agent. Killian and Mathewson raise it because they contend that Rowell's statement to the agent was hearsay as to them, which, of course, it was, and that they were prejudiced in the defense of their case by reason of this testimony.

The inquiry into the sufficiency of the evidence is two-fold. The first question is whether a conspiracy was proven within the intendment of the indictment. If this question is answered in the affirmative, the next question is: "Against which of the defendants was there adequate proof that he was a party to the conspiracy?" The separation of these issues is particularly necessary here because one of the defendants, the appellant Rowell, claims that there is not even the "slight" evidence (*see United States v. Sanchez*, 508 F.2d 388 (5th Cir. 1975)), which is required to implicate him in a conspiracy even though proven to exist as to others.

[1] We have little difficulty in concluding that there was ample evidence that Killian and Mathewson were engaged in a conspiracy to violate the statute. Direct, positive evidence of possession and sale was really not seriously disputed as to them. However, the same witnesses whose evidence was sufficient to warrant the conviction of these conspirators testified to facts that demon-

1. The testimony follows:

"Q. Now, when you went to the airport were you going out there as identifiable D.E.A. agents?
A. We went out there in an undercover capacity, to try to meet George, and talk with him.
Q. After going to the airport, did you happen to identify this individual named George?
A. Yes. When the flight departed when the passengers departed the plane, myself, Agent Driver and Agent Attaway observed Mr. Rowell walking down the corridor by himself.
We approached him. And he stated that he was George.
Q. Well, now was there any special reason why you picked out this individual as being George?
A. Well, he was about the freakiest of all.
MR. ADAMS:
Your Honor, I object to that. That is irrelevant and prejudicial.
THE COURT:
I will let him answer.
BY MR. LEMBCKE:
Q. He was the freakiest individual getting off of the plane.
Q. And so he did identify himself as George?
A. Yes, sir.
Q. And did you introduce yourselves?
A. Yes, sir. I told him my name was Bob, and Agent Driver, Doug, and Sue Ellyn, Sue Attaway. We told him we were friends of Charlie's.
Q. Did you ask him whether he had any drugs on him?
A. Yes, sir.
Q. And what did he say?
A. He stated that he had had fifty hits of PCP, but he had given it to a French chick he had met on the plane, coming down from Detroit.
Q. Did he indicate at that time that he had any other drugs with him?
A. No. He did not."

strated that the conspiracy for which they were charged terminated before Rowell was identified as having had any contact with the other two. The agents had arrested Killian and Mathewson and had taken possession of the PCP as to which their charge dealt before one of the agents took a telephone call at the Turner residence where the arrest took place. It was this telephone call which for the first time connected Rowell with Jacksonville and with the other defendants. There were several of these telephone calls, at least two of which were received by the Government agent, and the third was received by Turner, an indicted co-conspirator, who testified on behalf of the Government.[2]

By the time of the first call the only conspiracy alleged in the indictment was totally terminated, having been finally frustrated by the arrest of the three persons present at the Turner residence and the seizure of the remaining PCP on hand.

Upon his arrival at the Jacksonville airport Rowell was questioned. He as-

2. The text of these conversations is substantially as follows:

TESTIMONY OF AGENT DRIVER:

"Q. After the arrest did you have occasion to take a phone call?

A. Yes, I did. As we were in the apartment we had . . . the defendants were all being searched prior to removing them to the Jacksonville Beach jail for processing. The telephone rang and I answered the phone. At that time an individual identified himself as George, and asked for Charlie. I then stated that Charlie was unavailable. I told him that we had had a party that afternoon, and that Charlie was blown out his mind and was unable to come to the phone, he wasn't there right then. The individual then stated that he had to know by 9 o'clock if Charlie wanted him to get on the plane and 'I told him I understood from Charlie that Charlie was waiting for his arrival, that he was expecting someone, but I couldn't say for sure. The individual then told me to have Charlie call him, to get Charlie to call him. I reiterated the fact that Charlie was tied up, he was busy, and that he was unavailable but Charlie was expected.' "

WITNESS PAUL TURNER TESTIFIED:

"Q. Do you recall afterwards receiving a phone call?

A. Yeah.

Q. And would you tell us what happened in that phone call?

A. Well, he says: 'Is this Ricky's house?' I said: 'Yeah, it is.'

Q. Where did he say he was?

A. Michigan.

Q. Did he identify himself on the phone?

A. He said: 'George from Michigan.'

Q. And did you tell him anything?

A. Yeah, I said: 'Well, call this number and Rick will be there.'

(It turns out that the number was the number of agent Starratt whose testimony was as follows:)

A. At approximately 8:10 p.m. on July 22 I received a phone call. The individual on the other line identified himself as George . . . and he wanted to speak to Charles. I told him Charles was unavailable at this time but I was a close friend with Charlie, and Charlie told me to tell him to come on down that night—to come to Jacksonville and George said: 'Well, I don't know if I want to come. I want to talk to Charlie first.'

'I reiterated that he was not available, and if he left the message, I told him I would pick him up at the airport, just give me the flight number and I would be out there.'

Q. Did he, in fact, give you the flight number?

A. He did not at that time. He said: 'Well, I will think about it and call you back in 20 or 30 minutes.'

'At approximately 8:30 p.m. I received another call from George. George said he would be in on the Delta Flight 831 arriving in Jacksonville on the 23rd of July at approximately 1:36 a.m. . . . .'

Q. Now, did he say where he was coming from?

A. Detroit, Michigan."

sumed the agents questioning him were friends of Killian and Mathewson. We have quoted above the entire conversation as testified to by agent Starratt. This part of the statement attributed to Rowell by Starratt was only a small part of what the Government originally intended to introduce in the case. The trial court ruled out everything else that was said on the ground that, even though it would have been admissible against Rowell, it would have been so prejudicial to the other defendants that under the *Bruton* rule, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1967) an attempt to limit evidence for the jury's concern only to the person whose statement was being quoted would be insufficient to cure the prejudicial effect as to the other defendants. The trial court concluded that the testimony which was admitted either had no tendency to implicate either Killian or Mathewson in the conspiracy charge or, if so, the proof against them was so clear and undisputed and the inferences as to them arising from the Rowell statement were too evanescent to jeopardize their interests.

[2, 3] In the first place, we note that nothing Rowell said to the agents after the arrest of Killian and Mathewson would be legally admissible in evidence against them. Since the conspiracy had terminated any testimony of statements of his could not be received as binding on the other defendants under the co-conspirator rule, *Krulewitch v. United States*, 336 U.S. 440, 442–443, 69 S.Ct. 716, 93 L.Ed. 790 (1949). The question is whether the statements attributed to Rowell after the termination of the conspiracy could be validly used against him to show his participation in the already terminated conspiracy. We know of no rule that prohibits such evidence. Rowell freely indicated that he had arrived from Detroit; there was undisputed testimony previously given that the PCP source was in Detroit; that his name was George; that he was arranging a meeting with Mathewson and Rick Turner at the very time that the latter two had just been arrested in connection with the seizure of the PCP in Jacksonville; that he started South with a quantity of PCP and clearly indicated that he was expected by some of the other conspirators. While we agree with the trial court that these remarks by Rowell were insufficient, coming after the termination of the conspiracy, to permit the inference that he was a party to the conspiracy so as to be admissible against the others, we have no doubt about their sufficiency to permit the jury to consider them as bearing upon his being a member of the conspiracy. The hearsay statements were admissible against him as an admission against interest, but were not admissible, if objected to by the others, to help the Government make out its case of the conspiracy which had terminated.

Answering the two-part inquiry, then, we hold that there was enough direct evidence of the existence of a conspiracy between Killian and Mathewson to sustain their conviction; and, too, there was enough evidence in light of the testimony concerning Rowell's statement, to tie him into the conspiracy as well.

The contention by Killian and Mathewson that the hearsay statement of Rowell, not admissible as against them, was nevertheless prejudicial to their case can be quickly answered. In the first place, we note that counsel did not request the trial court to give a limiting instruction to the jury—that is to say they did not ask the court to tell the jury that whatever Rowell had to say after his arrival was admissible only as against him and

could not be considered on the question of guilt or innocence of the others. No such instruction was requested because, as commented on by the trial court, counsel seemed to consider that it might do them more harm than good.

[4] We recognize, of course, that even the giving of a limiting instruction may not be sufficient where a co-defendant's confession in a joint trial so clearly implicates the complaining co-defendant as to make it impossible for the jury to consider it only against the defendant who made it, *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *United States v. Maddox,* 492 F.2d 104 (5 Cir. 1974).

[5] The real substance of the matter here is, however, that while Rowell's statement was sufficient to tie him in to the conspiracy already so overwhelmingly proved against Killian and Mathewson, it really had no significant impact as to the existence of that conspiracy. It added nothing to the proof of the actual purchases, and offers for sale by the other conspirators fully testified to by the Government agents. The only point illuminated by Rowell's testimony was that in addition to the overwhelming proof of guilt of the others, Rowell simply tied himself in as a participant with that guilty conduct. For this reason, Rowell's testimony was hardly relevant, but if relevant at all, it was clearly without prejudicial effect and harmless beyond a reasonable doubt. As will be noted from reviewing the actual words which George Rowell was reported to have said they are sufficient from which the jury could infer that he had participated with the other conspirators to furnish the PCP which the jury found they possessed with the intent to sell and with having conspired to do so. There is not enough to add one feather's weight to the proof that went to the jury as to the existence of the conspiracy, as related to the other two defendants.

Another substantial ground of appeal raised by all of the appellants is that at the time of the Government's opening statement the jury was told that as a part of the Government's case there would be evidence "of a long conversation with George, at which George Rowell stated he was the source for the PCP that Charles was selling here in Jacksonville, Florida, and that he had sold them a great deal. And, of course, the agents will relate to you exactly what this conversation was all about," whereas, as we have noted above, no such testimony by the agent as to Rowell's having sold the PCP to Mathewson was admitted by the trial court.

[6] As we have previously said, this statement by the prosecuting attorney "was improper" and it was a "breach of propriety," *United States v. Stone,* 472 F.2d 909 (5th Cir. 1973). The vice of this argument is that at the time the Government attorney was telling the jury that he would prove that Rowell had made a confession, he knew it would be subject to attack on the ground of its being hearsay as to two of the defendants and on the grounds explained in *Krulewitch, supra,* (the termination of the conspiracy) and *Bruton, supra,* (the overwhelming prejudice it would have as against the remaining defendants, even though admissible as against Rowell himself).

In the *Stone* case, this Court, speaking of such an opening statement said: "We express our disapproval of the practice indulged in by the prosecution. It was improper." In the *Stone* case, defense counsel made a motion for mistrial at the time the statement was made. The trial court carried the motion with the case, with the idea that the motion

would be overruled if the confession was actually admitted, as it was in that case. The court then said: "Once the confession was found to be voluntarily made and received in evidence the effect of the prosecutor's breach of propriety was dissipated."

In the case now pending before us, counsel made no motion for a mistrial and made no motion to strike the statement when it was made, waiting until the conclusion of the trial to make a motion for mistrial for the improper statement. We consider this an important factor in determining whether reversible error occurred by reason of this improper opening statement. It is clear beyond doubt that defense counsel were aware at the time that the opening statement was made that they would attack the admissibility of George Rowell's alleged statement implicating himself and his two Jacksonville friends. They did not raise the issue at the time of the opening statement, and, furthermore, when the trial court was required to take out several hours during the trial to consider the proffer by the Government of the agents' statement of Rowell's conversation and when the court clearly showed its dissatisfaction with the fact that the Government had not cleared up this matter prior to trial, counsel still did not make a motion for mistrial, but waited until the Government's case was closed; the court then permitted the case to go on to the jury after the trial court had expurgated most of what Rowell was reported to have stated to the agents.

In light of the circumstances of the case as it developed, it appears that the conviction of Killian and Mathewson was in no way related to the source of their PCP. We conclude, therefore, that the statement in the opening remarks by Government counsel was in no way prejudicial to them. As to Rowell, the trial court, rightly we think, left enough testimony as to his identifying himself with the Jacksonville conspiracy to make it clear that as to him, also, the statement was not prejudicial. Since it was not objected to and since no timely motion for mistrial was made, we conclude that this prosecutorial misconduct did not amount to reversible error.

[7] This Court has too frequently been faced with appeals raising the issue of prosecutorial misconduct. More generally, it arises when the Government attorney argues his case to the jury, a situation which sometimes permits zeal to out run discretion. *See Handford v. United States*, 249 F.2d 295 (5 Cir. 1957), and *United States v. Brown*, 451 F.2d 1231 (5 Cir. 1971). In both of these cases, this Court reversed convictions because of improper argument. In other cases, either where no motion has been made or where the overkill contained in the argument, when weighed against the entire case seems to the satisfaction of this Court not to be prejudicial, we have criticized the conduct but have not reversed. It would appear that the language of this Court in the *Stone* case would have been sufficient warning to Government counsel to take pains to avoid making this precise mistake again. We now add this further authoritative determination that it is improper conduct for a prosecuting officer to state categorically to a jury that one of the defendants has confessed to the crime for which he is on trial unless such confession has already met the test of voluntariness and other questions of admissibility that may lurk in the trial to come. Neither the trial court nor this Court can spare the judicial time necessary to deal further with this problem

which we have unmistakably and clearly settled.

We have dealt with the complaint that the court erred in denying the motion of appellant Rowell for a judgment of acquittal based on the lack of evidence to support a conviction. We find no error in submitting his case to the jury.

[8] The appellants attack the action of the trial court in refusing to strike the testimony of Paul Warren Turner, one of the participants in the drug sales who testified on behalf of the Government. The basis for the attack was that he was incompetent because of being a user of some nature of drugs. It is contended that he was too incoherent for his testimony to be worthy of submission to the jury. While it is true that Paul Turner was a heavy user of drugs and that he suffered from time to time from hallucinations, he testified at the trial that he had not been under the influence of drugs for several days. Moreover, the trial court had an opportunity to examine his testimony in context with the other evidence introduced. We conclude, therefore, that the question of his competence to testify as a witness is one of the matters that must be left to the sound discretion of the trial court unless there can be shown to have been an abuse of discretion, *Shuler v. Wainwright*, 491 F.2d 1213, 1224 (5th Cir. 1974). Here, we find no such abuse of discretion.

The judgments are affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, Filed: January 20, 1976

Plaintiff-Appellee,

v No: 75-1437

GEORGE KILLIAN, GEORGE ROWELL and CHARLES MATHEWSON,

Defendants-Appellants.

On consideration of the application of the appellant, George Rowell, in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant, George Rowell, to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including January 29, 1976, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

U.S. CIRCUIT JUDGE

APPENDIX B

Nos 75-1091, 75-6118 and 75-6136

In the Supreme Court of the United States

OCTOBER TERM, 1975

GEORGE ROWELL, PETITIONER

v.

UNITED STATES OF AMERICA

CHARLES MATHEWSON, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE KILLIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1091

GEORGE ROWELL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-6118

CHARLES MATHEWSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-6136

GEORGE KILLIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner Rowell contends that the evidence was not sufficient to support his conviction. Petitioners Killian and Mathewson contend that the court erred in admit-

ting evidence of activities occurring after termination of the conspiracy and that certain of the prosecutor's opening remarks were improper.

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners Killian and Mathewson were convicted of having conspired to distribute a controlled substance and of having possessed a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Rowell was convicted only on the conspiracy count. Petitioners Killian and Mathewson were each sentenced to four years' imprisonment and two years' special parole on each count. Petitioner Rowell was sentenced to five years' imprisonment and two years' special parole. The court of appeals affirmed on December 29, 1975 (Pet. App. A).[1] The petitions in No. 75-6136 (Killian) and No. 75-1091 (Rowell) were not filed until January 30, 1976, and February 2, 1976, respectively, and are therefore out of time under Rule 22(2) of the Rules of this Court. The issues raised in the petitions do not, in any event, warrant further review.

The evidence at trial showed that Special Agent Douglas Driver of the Drug Enforcement Administration met with Richard Turner, Fontain Fitch and petitioner Charles Mathewson on July 6, 1974, in Jacksonville Beach, Florida, and purchased one ounce of phencyclidine hydrochloride (PCP) for $1,650. On July 15, 1974, Driver again contacted Turner to purchase eight additional ounces of PCP.[2] Turner said he only had two ounces of PCP on hand, and that he would have to get the remainder from his source of supply in Detroit, Michigan (Tr. 345-348).

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[1]All citations to the court of appeals' opinion refer to the appendix in No. 75-1091.

[2]Turner ultimately pleaded guilty to conspiracy to distribute a controlled substance, and was sentenced to three years' imprisonment.

On July 22, 1974, Turner agreed to sell Driver approximately two ounces of PCP. Upon arriving at Turner's home to complete the sale, Driver found several other individuals present, including petitioners Mathewson and Killian. Killian asked Driver whether he was still interested in purchasing a total of eight ounces of PCP. Killian stated that although he did not have eight ounces of PCP on hand, he could guarantee delivery the next morning (Tr. 349-351). Immediately after this conversation, Turner and petitioners Mathewson and Killian were arrested.

After the arrests, petitioner Rowell called Turner's apartment attempting to locate Mathewson. The agent who spoke with Rowell stated that Mathewson was unavailable and offered to take a message. Rowell stated that he needed to talk to Mathewson before 9:00 p.m. to determine whether Mathewson wanted him "to get on the plane" (Tr. 353). During the evening, Rowell made three more calls in an effort to locate Mathewson; during the last call, Rowell told Agent Robert Starratt the time and flight number for his arrival in Jacksonville (Tr. 331). Several undercover agents met Rowell at the airport, at which time Rowell stated he had left Detroit with 50 "hits" of PCP but that he had given them away on the plane (Tr. 356). Rowell was then arrested.

1. Petitioner Rowell's contention that the evidence was not sufficient to support his conspiracy conviction is without merit. As the court of appeals observed (Pet. App. 5), the record contained the following evidence from which the jury could reasonably have concluded that Rowell was a member of the conspiracy:

> Rowell freely indicated that he had arrived from Detroit; there was undisputed testimony previously given that the PCP source was in Detroit; that his name was George; that he was arranging a meeting

with Mathewson and Rick Turner at the very time that the latter two had just been arrested in connection with the seizure of the PCP in Jacksonville; that he started South with a quantity of PCP and clearly indicated that he was expected by some of the other conspirators.[3]

2. Petitioners Killian and Mathewson contend that the court erred in permitting evidence to be introduced concerning activities of and statements made by Rowell after their arrests. This contention was carefully considered and properly rejected by the court of appeals (Pet. App. 5-6):

> In the first place, we note that counsel did not request the trial court to give a limiting instruction to the jury—that is to say they did not ask the court to tell the jury that whatever Rowell had to say after his arrival was admissible only as against him and could not be considered on the question of guilt or innocence of the others. No such instruction was requested because, as commented on by the trial court, counsel seemed to consider that it might do them more harm than good.
>
> We recognize, of course, that even the giving of a limiting instruction may not be sufficient where a co-defendant's confession in a joint trial so clearly implicates the complaining co-defendant as to make it impossible for the jury to consider it only against the defendant who made it, *Bruton* v. *United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968); *United States* v. *Maddox,* 492 F.2d 104 (5 Cir. 1974).

[3]Rowell contends that the statements he had made were insufficient to connect him to the conspiracy. As the court of appeals noted (Pet. App. 5), however, Rowell's statements were only one of the elements of proof linking Rowell to the conspiracy. See *Smith* v. *United States,* 348 U.S. 147, 156.

The real substance of the matter here is, however, that while Rowell's statement was sufficient to tie him in to the conspiracy already so overwhelmingly proved against Killian and Mathewson, it really had no significant impact as to the existence of that conspiracy. It added nothing to the proof of the actual purchases, and offers for sale by the other conspirators fully testified to by the Government agents. The only point illuminated by Rowell's testimony was that in addition to the overwhelming proof of guilt of the others, Rowell simply tied himself in as a participant with that guilty conduct. For this reason, Rowell's testimony was hardly relevant, but if relevant at all, it was clearly without prejudicial effect and harmless beyond a reasonable doubt.

3. Petitioners Killian and Mathewson also contend that the prosecutor improperly asserted during his opening statement that the government would introduce evidence of a conversation in which petitioner Rowell had stated that he was the source of supply for the PCP that Mathewson was selling and that he had sold Mathewson a great deal of PCP. During the trial, the court ruled evidence of this conversation inadmissible and, as a consequence, no evidence of the conversation was offered. But Killian and Mathewson did not object to the prosecutor's statements at the time they were made or at the time the evidence was ruled inadmissible; instead, they delayed objecting to reference to the conversation until the conclusion of the trial (Tr. 437-439).

Even assuming that the prosecutor erred in referring to the conversation during his opening statement, the reference was harmless beyond a reasonable doubt. See *Chapman* v. *California,* 386 U.S. 18, 24. In view of the fact that petitioners' possession and intent to distribute PCP was established by testimony concerning their sales

to and negotiations with Special Agent Driver, the prosecutor's reference to a conversation showing that Rowell was Mathewson's source of supply could have added little, if anything, to the weight of the evidence against them. Had Killian and Mathewson believed otherwise, they should have objected to the reference to the conversation at the time it was made or at the time evidence concerning the conversation was ruled inadmissible. Furthermore, the trial court instructed the jury on three separate occasions that statements of counsel were not to be regarded as evidence and that the guilt or innocence of the defendants could be determined only on the basis of the testimony of the witnesses who appeared at the trial (Tr. 94, 508, 574).

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.